

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

CITY of SHORELINE, TOWN of
WOODWAY, and SAVE RICHMOND
BEACH, et al.,

Petitioners,

v.

SNOHOMISH COUNTY,

Respondent,

and

BSRE Point Wells, LLC,

Intervenor.

Coordinated Case Nos.

09-3-0013c and 10-3-0011c

(*Shoreline III and Shoreline IV*)

ORDER ON DISPOSITIVE MOTIONS

This matter came before the Board on dispositive motions by Respondent Snohomish County and Petitioner Save Richmond Beach in these coordinated cases – Case 09-3-0013c *Shoreline III* and Case 10-3-0011c *Shoreline IV*. The County moved (1) to dismiss certain Petitioners for lack of standing, (2) to dismiss SEPA challenges because the Petitioners lack standing to assert SEPA issues, and (3) to dismiss the legal issues raised by Petitioner Save Richmond Beach alleging non-compliance with GMA requirements for notice and public participation.¹ Save Richmond Beach filed a cross motion seeking summary resolution of the notice and public participation issue in *Shoreline IV*.²

¹ Snohomish County's Dispositive Motion for Partial Dismissal of Parties and Issues, Dec. 21, 2010

² Petitioner Save Richmond Beach's Dispositive Motion Regarding Lack of Public Notice (*Shoreline IV*), Dec. 21, 2010

1 **A. DISMISSAL OF RICHMOND BEACH PRESERVATION ASSOCIATION**

2 The County moves to dismiss the Richmond Beach Preservation Association and 23 named
3 individual petitioners³ (collectively, RBPA) from *Shoreline III*. The County asserts RBPA
4 lacks GMA participation standing to challenge the Ordinances at issue in *Shoreline III*
5 because RBPA did not participate in the County's public process. Further, the County
6 argues RBPA cannot demonstrate the injury-in-fact that is a prerequisite for SEPA standing.
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8 As they had indicated at the Prehearing Conference, RBPA responded with a motion for
9 voluntary dismissal from the *Shoreline III* cases.⁴ The County replied, asserting that the
10 Board's rules allow voluntary dismissal of "any action," not of discrete petitioners.⁵ RBPA
11 replies that, in a consolidated case involving multiple parties, the rule should be construed
12 so that "one petitioner is allowed to dismiss its case while the other petitioners continue to
13 pursue the consolidated 'action'."⁶
14

15
16 WAC 242-02-720(2) provides any action may be dismissed by the Board "upon motion of
17 the petitioner or respondent prior to the presentation of the respondent's case." The Board
18 finds the motion for voluntary dismissal is timely. The action on behalf of the Richmond
19 Beach Preservation Association and 23 named individuals in the *Shoreline III* proceeding is
20 **dismissed**.⁷ This dismissal renders the County's motion moot as to these parties.
21

22 **B. MOTION TO DISMISS SEPA ISSUES**

23
24 The County moves to dismiss the SEPA issues raised by Petitioners City of Shoreline
25 (Shoreline or City) and Save Richmond Beach (sometimes, SRB) in *Shoreline III* and *IV*.⁸
26 The County asserts there are three components to a petitioner's standing to raise a SEPA
27

28 ³ Jim Allen, Rae Allen, Randy Belair, Brad Bodley, Gail Dugan, Jerry Dugan, Jayne Engle, Duane Engle, Ken Caley, Kathy
29 Caley, Betty Drury, Jim Golden, Becky Golden, Elwood "Woody" Hertzog, Judy Lehde, Corliss Liekkio, Pete Liekkio, Rod
30 Madden, Marilyn Madden, Doris McConnell, James McCurdy, Ginny Scantlebury, Roy Scantlebury, Randy Stime and
31 Christine Stime

32 ⁴ Motion for Voluntary Dismissal of Richmond Beach Preservation Association and Individual Petitioners [Shoreline III],
Jan. 3, 2011.

⁵ Snohomish County's Response to Motion for Voluntary Dismissal (Jan. 11, 2011), at 2.

⁶ Reply in Support of Motion for Voluntary Dismissal (Jan. 11, 2011), at 2.

⁷ The Petitioner whose action continues in *Shoreline III* pursuant to PFR 09-3-0013 is Save Richmond Beach, Inc.

⁸ See, Prehearing Order (Dec.15, 2010), Legal Issues 8, 9, and 10.

1 challenge before the Board: (1) the petitioner must have provided comment on the
2 environmental documents during the SEPA comment period below, (2) the petitioner must
3 allege SEPA standing in the petition for review, and (3) the petitioner must meet APA
4 standing requirements, including, in particular, demonstration of "injury-in-fact."⁹ The County
5 contends neither the City of Shoreline nor Save Richmond Beach, who have raised SEPA
6 challenges, meets these criteria.
7

8 The City of Shoreline argues that the Board should use this occasion to abandon the
9 Central Board's long-held application of a two-part test to determine standing in SEPA
10 cases.¹⁰ Nevertheless, Shoreline asserts that it provided comments in the County's SEPA
11 process and that its Petitions for Review demonstrate injury-in-fact.
12

13 Save Richmond Beach states that its Petitions for Review adequately allege APA standing
14 and urges that it should be accorded the opportunity on the merits to demonstrate injury-in-
15 fact.¹¹
16

17
18 *1. Providing SEPA Comment*

19 The County states that Save Richmond Beach did not comment on any of the SEPA
20 documents for Point Wells during the specified comment periods and that the City of
21 Shoreline failed to comment on the DNS for the ordinances challenged in *Shoreline IV*.¹²
22 The County urges the Board to dismiss Legal Issues 8, 9, and 10 because these petitioners
23 failed to exhaust administrative remedies.
24

25 Save Richmond Beach does not provide any documentation of its participation during the
26 SEPA comment period for either the DSEIS for the *Shoreline III* ordinances or the DNS for
27 the *Shoreline IV* ordinances. As for the City of Shoreline, it is undisputed that the City
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31 ⁹ County Dispositive Motion, at 19-21.

32 ¹⁰ Shoreline's Response to Snohomish Dispositive Motion for Partial Dismissal (Jan. 3, 2011), *passim*. The City points out that the three regional Growth Management Boards have now been legislatively merged, and urges that their differences on this legal question should be harmonized.

¹¹ Petitioner Save Richmond Beach's Response to Snohomish County's Dispositive Motion (Jan. 3, 2011), at 3-5.

ORDER ON DISPOSITIVE MOTIONS *Shoreline III* and *Shoreline IV*

Coordinated Case Nos. 09-3-0013c and 10-3-0011c

January 18, 2010

Page 3 of 28

commented on the DSEIS for the *Shoreline III* ordinances. However, the parties dispute the City's participation in the DNS process for the *Shoreline IV* ordinances.¹³

The Central Puget Sound Growth Management Hearings Board has long held:

The GMA and SEPA are two distinct statutes with their own standing requirements that each must be met by petitioners if they intend to challenge actions for not complying with both statutes.¹⁴

The standing requirements in the SEPA legislation – RCW 43.21C.075 – are discussed more fully below. But first the Board looks to the SEPA regulations to determine the effect of failure to participate in environmental review. WAC 197-11-545 indicates the effect of not submitting comments to the lead agency during the SEPA comment period (emphasis added):

(1) **Consulted agencies.** If a consulted agency does not respond with written comments within the time periods for commenting on environmental documents, the lead agency may assume the consulted agency has no information relating to the potential impact of the proposal as it relates to the consulted agency's jurisdiction or special expertise. Any consulted agency that fails to submit substantive information to the lead agency in response to a draft EIS *is thereafter barred from alleging any defects* in the lead agency's compliance with Part Four of these rules.

(2) **Other agencies and the public.** Lack of comment by other agencies or members of the public on environmental documents, within the time periods specified by these rules, *shall be construed as lack of objection* to the environmental analysis, if the requirements of WAC 197-11-510 are met.

WAC 197-11-545 subsection (1) applies to consulted agencies, saying the consequence of failure to comment on environmental documents is that the agency "is thereafter **barred** from alleging any defects" in compliance. This section of the SEPA rules bars a consulted

¹² County Dispositive Motion at 19, 37.

¹³ Shoreline Response to Dispositive Motion, at 5, 13; Snohomish County's Reply to City of Shoreline's and Save Richmond Beach's Responses to Snohomish County's Dispositive Motion (Jan. 10, 2011), at 51-53.

¹⁴ *Robison v. City of Bainbridge Island*, CPSGMHB Case No. 94-3-0025, Order on Dispositive Motions (Feb. 16, 1995), at 5.

1 agency from raising issues in a SEPA appeal unless it provided written comment during the
2 comment period.¹⁵

3
4 The Board has previously held that a city that failed to provide comment during the SEPA
5 comment period was barred from challenging EIS adequacy before the Board:

6 It is clear from [WAC 197-11-545 and WAC 197-11-550] that those agencies
7 which, during the specific comment period, fail to comment on environmental
8 documents may not subsequently challenge those documents as being defective.
9 The time for challenging the adequacy of the documents is during the comment
10 period so as to provide the lead agency with the opportunity to incorporate those
11 comments into the final analysis.¹⁶

12 The City of Shoreline asserts it is a “consulted agency” with respect to the DNS for the
13 *Shoreline IV* ordinances.¹⁷ Shoreline points out that it commented on the DSEIS for the
14 *Shoreline III* ordinances.¹⁸ However, the City states it was not provided notice of the DNS
15 for the *Shoreline IV* ordinances, according to the County’s record, although WAC 197-11-
16 340(2)(b) requires such notice. Thus, the City contends the County cannot raise lack of
17 participation as a standing defect.¹⁹ Further, the City points out that it submitted a comment
18 letter in April 2009 prior to the close of the DNS comment period.²⁰

19
20 The Board notes the April 2009 letter relied on by the City for its DNS comment, while not
21 denoted as a DNS comment or addressed to the director of PDS as required, reiterates the
22 City Council’s objections to the adequacy of environmental review in the prior DSEIS,
23 through an attached resolution.²¹ Reviewing the question of SEPA standing on this limited
24 record, the Board concludes that Shoreline has made a sufficient showing of comment;
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29 ¹⁵ See, e.g., *Kitsap County v. DNR*, 99 Wn. 2d 386, 391-92 (1983); *DNR and WDFW v. Kitsap County*, SHB 03-018 (2004).

30 ¹⁶ *Bothell, et al. v. Snohomish County*, CPSGMHB Case No. 07-3-0026c, Final Decision and Order (Sept. 17, 2007), at 63.

31 ¹⁷ Shoreline’s Response, at 12, citing WAC 197-11-340(2)(a) and (b). Shoreline’s construction of the SEPA WACs is
disputed in the County’s Reply, at 48-50.

32 ¹⁸ Index ## 110, 131, 190, 215.

¹⁹ *Id.* at 12, citing *McVittie v. Snohomish County*, CPSGMHB Case No. 00-3-0016, (Nov. 6, 2000).

²⁰ Index #89.

²¹ Resolution 285 (April 13, 2009), Index #89.

1 Shoreline is not barred from a SEPA challenge in *Shoreline IV* for failure to comment during
2 the environmental review process.

3
4 **WAC 197-11-545 subsection (2)** applies to other agencies and members of the public,
5 stating that failure to comment “shall be construed as lack of objection.” Professor Settle
6 comments on subsection (2):

7 [The SEPA rules go] beyond consulted agencies to provide that lack of timely
8 comment by other agencies or members of the public ‘shall be construed as lack
9 of objection to the environmental analysis.’ Since this provision does not purport
10 to absolutely bar legal challenge for nonparticipation in the DEIS commenting
11 process, apparently common law principles of waiver and exhaustion of
12 administrative remedies would govern.²²

13 One of SEPA’s purposes is to ensure complete disclosure of the environmental
14 consequences of a proposed action before a decision is taken.²³ Participation and objection
15 to the environmental analysis is therefore a prerequisite to review of agency SEPA
16 compliance.²⁴

17
18 As explained by the Pollution Control Hearings Board:²⁵

19 Participation in public hearings, or commenting through the environmental review
20 process, are in some circumstances the only administrative remedy available to a
21 party and thus are the forums in which exhaustion of remedies must occur in
22 order for the party to later make a claim. See, *Citizens v. Mount Vernon*, 133
23 Wn.2d at 869. The very language of WAC 197-11-545(2) that ‘lack of comment’
24 shall be construed as ‘lack of objection’ to the environmental analysis assumes
25 that a comment period is part of an available administrative process that should
26 be utilized by interested members of the public. In this case, it is undisputed that
27 [petitioners] did not make any comment during the environmental review
28 process....

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31 ²² Richard L. Settle, *The Washington State Environmental Policy Act, A Legal and Policy Analysis*, Section 14.01 [10],
pages 14-76/77 (12/03 ed.) The Board takes official notice of this learned treatise.

32 ²³ *Kitsap County*, 99 Wn.2d at 391; *King County v. Boundary Review Board*, 122 Wn.2d at 663.

²⁴ *Citizens v. Mount Vernon*, 133 Wn. 2d 861, 869, 947 P.2d 1208 (1997).

²⁵ *Spokane Rock Products, Inc., et al, v Spokane County Air Pollution Control Authority*, PCHB No. 05-127, Order Granting
Motion for Summary Judgment (Feb. 13, 2006), at 10.

ORDER ON DISPOSITIVE MOTIONS *Shoreline III and Shoreline IV*

Coordinated Case Nos. 09-3-0013c and 10-3-0011c

January 18, 2010

Page 6 of 28

1 The County asserts that none of the members or representatives of Save Richmond Beach
2 provided comments on behalf of SRB regarding any of the SEPA documents for Point Wells
3 during the designated comment periods for the *Shoreline III* or *Shoreline IV* ordinances.²⁶
4 Save Richmond Beach has not provided any evidence to the contrary. Pursuant to WAC
5 197-11-545(2) such lack of comment “**shall be construed** as lack of objection to the
6 environmental analysis.” Therefore the Board concludes that Save Richmond Beach is
7 precluded from raising SEPA issues in this case due to their lack of participation and
8 comment in the SEPA review process.
9

10 2. *Alleging SEPA Standing in the Petition for Review*

11 The Board’s Rules of Practice and Procedure provide that a petition for review “shall
12 substantially contain ... (d) a statement specifying the type and the basis of the petitioner’s
13 standing before the board pursuant to RCW 36.70A.280(2).”²⁷ The County contends the
14 Board should dismiss the SEPA issues in this case because neither Shoreline nor Save
15 Richmond Beach expressly alleges SEPA standing in their petitions for review.
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18 The County cites Board decisions stating: “Failure to allege SEPA standing in the PFR is
19 grounds for the Board to dismiss a SEPA claim.”²⁸ However, the Board reads each of the
20 cited decisions in context and notes, in each case, the Board looked beyond the statement
21 of standing in the petition for review and assessed whether the petitioner met the standing
22 requirements adopted by the Board for SEPA cases. Thus, if the Board has previously
23 applied the quoted sentence out of context, it declines to do so here.
24
25

26 The Board has concluded, *supra*, that Save Richmond Beach is precluded from raising
27 SEPA issues in these proceedings because it failed to provide comment during the SEPA
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31 ²⁶ County Dispositive Motion, at 20.

32 ²⁷ WAC 242-02-210

²⁸ Citing, *Halmo et al v. Pierce County*, CPSGMHB Case No. 07-3-0004c, Final Decision and Order (Sep. 28, 2007) at 44-45; *MBA/Brink v. Pierce County*, CPSGMHB Case No. 02-3-0010, Order on Motions (Oct. 21, 2002), at 5-6; *Hensley VI v Snohomish County*, CPSGMHB Case No. 03-3-0009c, Order on Motions (May 19, 2003), at 11.

ORDER ON DISPOSITIVE MOTIONS *Shoreline III and Shoreline IV*

Coordinated Case Nos. 09-3-0013c and 10-3-0011c

January 18, 2010

Page 7 of 28

1 review process; thus the Board need not decide the sufficiency of SEPA standing
2 allegations in the Save Richmond Beach petitions for review.²⁹

3
4 The City of Shoreline's Petitions for Review in both cases claim standing under RCW
5 36.70A.280(a) – as a city that plans under the GMA. However, the text of the legal issues
6 presented by the City clearly identify the “zone of interest” and “injury-in-fact” that are
7 required for SEPA standing.³⁰ The Board concludes that the City of Shoreline's standing to
8 raise SEPA challenges is not barred by deficiencies in its petitions for review.
9

10 3. Meeting the SEPA Standing Criteria

11 The Central Board's long-held position on SEPA standing is based on the statutory
12 provisions in the State Environmental Policy Act which define the basis for appeal of a
13 SEPA determination.³¹ RCW 43.21C.075, entitled “Appeals,” is the controlling provision in
14 SEPA regarding standing to challenge environmental review.³² Subsection (4) provides in
15 part:
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18 ²⁹ The Board notes that the Save Richmond Beach petitions for review included detailed statements of APA standing. For
19 example, SRB's Amended Petition for Review in *Shoreline III* alleges standing under RCW 36.70A.280(2)(d) – APA
20 standing – and includes over a page of specific assertions concerning the interests and injuries of its member petitioners.
21 SRB's Petition for Review in *Shoreline IV* also alleges standing under RCW 36.70A.280(2)(d) – APA standing.

³⁰ Legal Issues 8, 9, and 10 state the SEPA questions raised by the City of Shoreline and Save Richmond Beach:

8. Did Snohomish County fail to comply with SEPA where the SEIS prepared for the project: 1)
22 considered only the “do nothing” and high-density “Urban Center” alternatives; 2) failed to identify the specific
23 units of local government that would provide essential services to an Urban Center at Point Wells; 3) failed to
24 address the significant probably adverse impacts and required mitigation for existing essential services in
25 Shoreline, including emergency services, transportation, and parks; and 4) failed to address how greenhouse gas
26 emissions and climate change impacts from an Urban Center at Point Wells would be mitigated?

9. [SHORELINE IV] Was the County's SEPA review process inconsistent with its Comprehensive Plan
27 policies and in violation of RCW 36.70A.140, .040(4) and .120 in that the County adopted a SEPA review process
28 for the Urban Center zoning district for Point Wells without a non-project EIS, an action inconsistent with and
29 failing to implement LU Policy 5.B.12 and in violation of the early and continuous public participation contemplated
30 by requiring the EIS as a planning tool?

10. [SHORELINE IV] Did the County fail to comply with SEPA by issuing a DNS that 1) failed to identify
31 the specific units of local government that would provide parks, police, fire and emergency services to an Urban
32 Center at Point Wells; and 2) failed to address probable significant adverse impacts requiring an EIS under RCW
43.21C.030(2)(c) (including inadequate police, fire and emergency medical response to support projected growth,
impacts to parks in Shoreline, and implementation of transportation projects in Shoreline to mitigate projected
growth without interlocal agreements or development agreements for such projects), and the impacts are different
than those addressed in the 2005 GMA Comprehensive Plan Update EIS or the 2009 SEIS for Point Wells?

³¹ See recent analysis in *Davidson Serles, et al v. City of Kirkland*, CPSGMHB Case No. 09-3-0007c, Order on Motions
(June 11, 2009), at 11.

³² The legislature has the authority to define and restrict standing. *Citizens for Clean Air v. Spokane*, 114 Wn. 2d 20, 29,
785 P.2d 447 (1990). The legislature has imposed standing restrictions in other land use provisions. See for example, the
ORDER ON DISPOSITIVE MOTIONS *Shoreline III* and *Shoreline IV*

1 ... a person aggrieved by an agency action has the right to judicial appeal ...

2
3 The Washington appellate courts have clarified the reach of the language. A “person
4 aggrieved” who seeks judicial review of a SEPA determination must meet a two-part test to
5 establish standing – the *Trepanier* test.³³

6
7 In its early cases where this question was raised, the Central Board reasoned that,
8 inasmuch as its jurisdiction included determining compliance with SEPA and with the GMA,
9 it was bound by the differing standing requirements under the two different statutes.³⁴ In
10 *Robison v. Bainbridge Island*,³⁵ the Board reasoned

11 [O]btaining GMA appearance standing does not automatically bestow SEPA
12 standing upon a petitioner. The GMA and SEPA are two distinct statutes with
13 their own standing requirements that each must be met by petitioners if they
14 intend to challenge actions for not complying with both statutes.

15
16 The “aggrieved person” standing test applied to SEPA proceedings – the *Trepanier* test³⁶ –
17 requires a two-part analysis:

18 First, the plaintiff’s supposedly endangered interest must be arguably within the
19 *zone of interests* protected by SEPA. Second, the plaintiff must allege an *injury in*
20 *fact*, that is, the plaintiff must present sufficient evidentiary facts to show that the

21
22 GMA’s standing provisions at RCW 36.70A.280(2), the Boundary Review Board Statute requirements at RCW
36.93.160(5), or the LUPA standing provisions at RCW 36.70C.060.

23 ³³ The two-part SEPA standing analysis used by the Central Puget Sound Growth Management Hearings Board since
24 1995 is based on *Leavitt v. Jefferson County*, 74 Wn. App. 668, 678, 875 P.2d 681 (1994) and *Trepanier v. Everett*, 64 Wn.
App 380, 382-83, 824 P. 2d 524, review denied, 119 Wn.2d 1012 (1992).

25 ³⁴ See e.g., *West Seattle Defense Fund v. City of Seattle*, CPSGMHB Case No. 94-3-0016, Order Granting Seattle’s
26 Motion to Dismiss SEPA Claims (Dec. 30, 1994), at 8; *Bremerton v. Kitsap County*, CPSGMHB Case No. 95-3-0039, *Order*
on County’s Dispositive Motions (June 9, 1995), at 6.

27 ³⁵ CPSGMHB Case No. 94-3-0025c, Order on Dispositive Motions (Feb. 16, 1995), at 6-7.

28 ³⁶ The Central Puget Sound Growth Management Hearings Board applies the *Trepanier* test, as developed by the courts,
to determine SEPA standing. See, e.g., *Hensley VI v. Snohomish County*, CPSGMHB Case No. 03-3-0009c, Order on
29 Motions (May 19, 2003), at 9-10; *Rural Bainbridge Island v. City of Bainbridge Island*, CPSGMHB Case No. 98-3-0030c,
Order on Dispositive Motions (Oct. 16, 1998), at 4; *HEAL v. City of Seattle*, CPSGMHB Case No. 96-3-0012, Final
Decision and Order (Aug. 21, 1996), at 9.

30 The Western Washington Growth Management Hearings Board applies a GMA participation standing standard for SEPA
31 issues. *Whidbey Environmental Action Council (WEAN) v. Island County*, WWGMHB Case No. 03-2-0008, Final Decision
and Order (Aug. 23, 2003).

32 The Eastern Washington Growth Management Hearings Board has applied the *Trepanier* test (*Spokane County Fire*
District No. 10 v. City of Airway Heights, EWGMHB 02-1-0019, Final Decision and Order (July 31, 2003)), but subsequently
adopted the WEAN analysis of the SEPA standing issue (*Superior Asphalt & Concrete Co. v Yakima County, et al.*,
EWGMHB Case No. 05-1-0012, Order on Motions (Feb. 20, 2006)).

ORDER ON DISPOSITIVE MOTIONS *Shoreline III and Shoreline IV*

Coordinated Case Nos. 09-3-0013c and 10-3-0011c

January 18, 2010

Page 9 of 28

Growth Management Hearings Board

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1 challenged SEPA determination will cause him or her specific and perceptible
2 harm. The plaintiff who alleges a threatened injury rather than an existing injury
3 must also show that the injury will be “immediate, concrete, and specific”; a
4 conjectural or hypothetical injury will not confer standing.³⁷

5 In the present case, only the second prong of the two-part standing test – injury-in-fact – is
6 questioned. The County argues that neither the City of Shoreline nor Save Richmond Beach
7 can demonstrate harms that are other than “speculative and conjectural:”

8 They are harms that may result from hypothetical development projects but that
9 do not stem from the challenged legislative action itself (here, the Ordinances).
10 These alleged harms are not immediate, concrete, and specific.³⁸

11
12 The County moves to dismiss the SEPA claims of both the City and SRB.

13
14 In response, the City of Shoreline urges the Board to abandon the two-part standing test for
15 SEPA challenges and to allow SEPA claims to be asserted based simply on GMA
16 participation standing.³⁹ Alternatively, the City contends the harms it faces constitute injury-
17 in-fact. The City states that the Point Wells property is about 50 usable acres owned by a
18 single party.⁴⁰ The rezone to Urban Center includes separate and distinct development
19 standards adopted for Point Wells alone, in essence vesting densities which will directly
20 impact Shoreline as the adjacent provider of urban services.

21
22 The Board notes its prior decisions have seldom found the requisite “immediate, concrete,
23 and specific” injury-in-fact when an area already designated urban is re-zoned to a higher
24 density, especially where project-specific environmental review and mitigation has not yet
25 occurred.⁴¹ The Board has recognized, however, that comprehensive plan amendments
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30 ³⁷ *Master Builders and Brink, et al. v. Pierce County*, CPSGMHB Case No. 02-3-0010, Order on Motion to Dismiss SEPA
Claims (Oct. 21, 2002), at 2 (emphasis added).

31 ³⁸ County Dispositive Motion at 25.

32 ³⁹ Shoreline Response, at 6-12.

⁴⁰ Shoreline Response, at 13-16.

⁴¹ Compare *Save Our Separators et al v. City of Kent (SOS)*, CPSGMHB Case No. 04-3-0019, Final Decision and Order
(Dec. 16, 2004), at 5 (injury not “immediate” where subsequent site-specific SEPA process could mitigate impacts), with
Davidson Serles et al v City of Kirkland, CPSGMHB Case No. 09-3-007c, Order on Motions (June 11, 2009), at 16-17

ORDER ON DISPOSITIVE MOTIONS *Shoreline III and Shoreline IV*

Coordinated Case Nos. 09-3-0013c and 10-3-0011c

January 18, 2010

Page 10 of 28

1 may create immediate impacts to adjacent cities. In the *Bothell* case, the City of Lynnwood
2 challenged a previous Snohomish County Urban Center designation:

3 Lynnwood argues that its role as “a municipality charged with the responsibility to
4 engage in comprehensive planning and provide critical public services” makes it
5 a “somewhat unique SEPA petitioner.”... Lynnwood contends that the capacity of
6 its streets, surface water management systems, and other public infrastructure
7 and services are immediately impacted by the County’s action because it must
8 now plan and size facilities for ultimate buildout. Lynnwood asserts that the injury
9 to the city is real, immediate and not speculative, because Lynnwood must now
10 revisit its planning processes for its Urban Center and infrastructure. For
11 example, planned capital improvements in the Scriber Creek basin, where
12 flooding is already an issue, must be revisited. Further, Lynnwood claims that
13 plans and permitting for further development within Lynnwood are impeded as
14 the County’s “urban center” absorbs Lynnwood’s street and infrastructure
15 capacity.⁴²

14 In agreeing that the alleged harms to Lynnwood were concrete and immediate, as opposed
15 to merely speculative, the Board acknowledged:

16 [C]ounty actions on a city’s border may conceivably cause the city ‘injury in
17 fact’ as they require the city to revise its planning and financing and divert
18 resources to provide urban services for unanticipated development on the
19 city’s fringe.⁴³

20 In the present case, the City of Shoreline claims similar harms – a direct impact on its
21 planning and funding of transportation infrastructure, parks and other public services. The
22 impacts are documented in its written comments during the SEPA process,⁴⁴ asserted in its
23 petitions for review, and summarized in its response to the County’s dispositive motion.⁴⁵
24 The County counters that no project application has vested at Point Wells, distinguishing the
25 Lynnwood case,⁴⁶ and that environmental review and mitigation will continue at the project
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30 (specific injury demonstrated where City’s plan amendment and planned action ordinance effectively foreclosed additional
31 mitigation).

32 ⁴² *Bothell, supra*, Order on Motions, at 4.

⁴³ *Bothell, supra*, Final Decision and Order (Sep. 17, 2007), at 38.

⁴⁴ Index 110, 131, 190, 215.

⁴⁵ Shoreline Response to Dispositive Motion, at 13-14.

⁴⁶ *Bothell*, Order on Motions (June 1, 2007), at 4.

1 level, distinguishing *Davidson-Serles*.⁴⁷ The County states the City has alleged only
2 “hypothetical, conjectural and speculative” injuries which fail to provide SEPA standing.⁴⁸
3

4 The Board is not persuaded by the County’s assertions. Under the GMA, a County’s
5 amendment of its comprehensive plan and development regulations may create immediate
6 obligations for an adjoining city to plan consistently, preparing the necessary infrastructure
7 and service capacity. The Board finds the harms alleged by the City constitute injury-in-fact.
8 The Board concludes that the City of Shoreline has satisfied the two-part test for standing to
9 challenge the County’s SEPA review in *Shoreline III* and *Shoreline IV*.
10

11 Save Richmond Beach alleges harms clearly within the zone of interests of SEPA. SRB
12 submits the Declaration of Caycee Holt and asserts that it has raised a significant issue of
13 fact concerning injury-in-fact which it should be allowed an opportunity to establish as this
14 case is heard on the merits.⁴⁹ The Board has concluded, *supra*, that Save Richmond Beach
15 is precluded from raising SEPA issues in these proceedings because it failed to provide
16 comment during the SEPA review process; thus the Board need not address SRB’s
17 arguments related to satisfaction of the *Trepanier* test.⁵⁰
18
19

20 **Conclusion.** Save Richmond Beach is precluded from pursuing SEPA claims in these
21 proceedings, due to failure to comment during the SEPA process. The City of Shoreline has
22 standing to pursue SEPA claims in both *Shoreline III* and *Shoreline IV*. Snohomish County’s
23 motion to dismiss Save Richmond Beach SEPA challenges in *Shoreline III* and *IV* is
24 **granted**. Snohomish County’s motion to dismiss City of Shoreline SEPA claims in *Shoreline*
25 *III and IV* is **denied**.
26
27
28
29

30 ⁴⁷ *Davidson Serles*, Order on Motions, at 16-17.

31 ⁴⁸ Snohomish County Reply, at 20-23.

32 ⁴⁹ SRB’s Response to Dispositive Motion, at 5.

⁵⁰ The Board notes the Save Richmond Beach petitions for review and Declaration of Caycee Holt do not on their face establish injury-in-fact. If the SEPA standing of these petitioners were not already precluded, the Board would be hard-pressed to find standing from the facts before it.

ORDER ON DISPOSITIVE MOTIONS *Shoreline III and Shoreline IV*

Coordinated Case Nos. 09-3-0013c and 10-3-0011c

January 18, 2010

Page 12 of 28

1 **C. LEGAL ISSUE 7 – NOTICE AND PUBLIC PARTICIPATION**

2 WAC 242-02-530(6) provides that the Board may consider motions challenging compliance
3 with the GMA notice and public participation requirements, so long as that determination
4 can be made on a limited record:

5 Any party may bring a motion for the board to decide a challenge to compliance
6 with the notice and public participation requirements of the act raised in the
7 petition for review, provided that the evidence relevant to the challenge is limited.
8 If such a motion is timely brought, the presiding officer or the board shall
9 determine whether to decide the notice and public participation issues(s) on
10 motion or whether to continue those issues to the hearing on the merits.

11 At the Prehearing Conference, Save Richmond Beach and Snohomish County indicated
12 they would each file a motion for resolution of the notice and public participation issue. As
13 set forth in the Prehearing Order, Legal Issue 7 states:

14 7. Did the Ordinances fail to be guided by RCW 36.70A.020(11) and fail to
15 comply with RCW 36.70A.140 and RCW 36.70A.035 where Snohomish County
16 introduced and adopted new substantive amendments to the Ordinances at the
17 end of the public comment period or after the public comment period had closed,
18 without providing further public notice or an opportunity to provide comment? If
19 so, are the ordinances invalid?

20 Snohomish County moved to dismiss the Legal Issue 7 challenge for *Shoreline III* and for
21 *Shoreline IV*.⁵¹ Save Richmond Beach filed its cross-motion for determination of compliance
22 with the GMA notice and public participation requirements with respect to two last-minute
23 amendments to Ordinance 09-079 challenged in *Shoreline IV*.⁵² In its response to the
24 County's motion, SRB contended that the County also violated the GMA notice and public
25 participation requirements with respect to a last-minute amendment to Ordinance 09-051
26 challenged in *Shoreline III*.⁵³ Various parties filed responses and replies.⁵⁴
27
28
29

30 ⁵¹ Snohomish County's Dispositive Motion for Partial Dismissal of Parties and Issues (Dec. 21 2010) [*Shoreline III* notice
31 issue, at 26-32; *Shoreline IV* notice issue, at 41-45].

32 ⁵² Petitioner Save Richmond Beach's Dispositive Motion Regarding Lack of Public Notice (*Shoreline IV*), (Dec. 22, 2010).

⁵³ SRB's Response to County's Dispositive Motion, at 6-12.

⁵⁴ Snohomish County's Response to Petitioner Save Richmond Beach's Dispositive Motion Regarding Lack of Public
 Notice, (Jan. 3, 2011)

 Intervenor BSRE Point Wells LP's Response to Motions (Jan. 3, 2011)

 ORDER ON DISPOSITIVE MOTIONS *Shoreline III* and *Shoreline IV*

 Coordinated Case Nos. 09-3-0013c and 10-3-0011c

 January 18, 2010

 Page 13 of 28

1 The Board considers first, the timeliness of SRB's dispositive motion, second, the *Shoreline*
2 *III* challenge under Legal Issue 7, and third, the *Shoreline IV* challenge under Legal Issue 7.

3
4
5 *1. Timeliness of Save Richmond Beach Dispositive Motion*

6 Snohomish County asks the Board to deny the Save Richmond Beach dispositive motion as
7 untimely.⁵⁵ The Prehearing Order set the deadline for dispositive motions at December 21,
8 2010. SRB's motion was filed electronically at 5:18 p.m. on December 21, and so has been
9 dated December 22.⁵⁶ The SRB motion was also served on the County electronically at 5:18
10 p.m. December 21.⁵⁷

11
12 The SRB motion was filed and served past the deadline for filing such motions established
13 in the Prehearing Order. Nevertheless, under the circumstances of this case, the Board
14 determines that dismissal of the SRB motion would not serve the interests of efficient
15 resolution of these cases.

16
17 First, the Save Richmond Beach motion was filed and served a mere 18 minutes late. At the
18 Prehearing Conference the Board had already extended the deadlines for responses and
19 replies to motions in light of the holiday season; no party's ability to respond was prejudiced
20 by the 18-minute delay in this instance. Further, at the Prehearing Conference the Presiding
21 Officer discussed with the parties the compression of the motion schedule and indicated
22 that some flexibility might be negotiated.⁵⁸
23
24
25

26
27

Petitioner Save Richmond Beach's Response to Snohomish County's Dispositive Motion for Partial Dismissal of Parties
and Issues (Jan. 3, 2011)

28 Snohomish County's Reply to the City of Shoreline's and Save Richmond Beach's Responses to Snohomish County's
Dispositive Motion (Jan. 10, 2011).

29 Reply of Petitioner Save Richmond Beach on Dispositive Motion Regarding Lack of Public Notice (Jan. 10, 2011)

30 Intervenor BSRE Point Wells LP's Reply to Motions (Jan. 10, 2011)

31 ⁵⁵ County's Response to SRB Dispositive Motion, at 5-8.

32 ⁵⁶ WAC 242-02-240(2)(a) provides in part: "Any transmission not completed before 5:00 p.m. will be stamped received on
the following business day."

⁵⁷ WAC 242-02-310(1) requires parties to serve copies of pleadings on all other parties "no later than the date upon which
they were [required to be] filed with the board."

⁵⁸ Generally when a party experiences a computer glitch or other unavoidable delay in meeting a briefing deadline, the
Board expects the party to notify the Board office and contact other parties and propose a reciprocal arrangement allowing
ORDER ON DISPOSITIVE MOTIONS *Shoreline III* and *Shoreline IV*

Coordinated Case Nos. 09-3-0013c and 10-3-0011c

January 18, 2010

Page 14 of 28

Growth Management Hearings Board

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1 Second, the County and Intervenor BSRE have fully responded to SRB's motion. No
2 efficiency is gained by disregarding SRB's motion or the County and BSRE's responses or
3 by deferring consideration to the Hearing on the Merits or subsequent appeals.
4

5
6 Third, the County and SRB have filed cross-motions on the question of notice and public
7 participation in *Shoreline IV*.⁵⁹ If there has been a failure of compliance that requires the
8 Ordinances to be remanded for additional notice or public process, the matter should be
9 decided promptly. The interests of full and efficient resolution are best served by the Board's
10 review of the substantive arguments put forth by both moving parties on this issue.
11

12 Under these particular circumstances, the Board **declines** to deny Save Richmond
13 Beach's motion as untimely.
14

15 The County has filed a motion to strike the Declaration of Zachary Hiatt,⁶⁰ and Save
16 Richmond Beach has filed a "Limited Response."⁶¹ Because the Board has determined to
17 consider the Save Richmond Beach dispositive motion on its merits, the Board disregards
18 the Declaration of Zachary Hiatt, the Declaration of Matthew Otten, the County's motion to
19 strike and SRB's counter-motion in its Limited Response.
20

21 22 2. County Motion to Dismiss Legal Issue 7 Regarding Shoreline III

23 With its dispositive motion, the County submits evidence from which it contends it has fully
24 complied with the GMA requirements for notice and public participation in enactment of the
25
26
27

28
29 the responding party an equivalent extension of time. In the present case, the dispute has degenerated into a spitting
match.

30 ⁵⁹ Save Richmond Beach indicates that it would have also filed a cross-motion on the *Shoreline III* last-minute amendment
but for delays in accessing the County's record. Reply of Petitioner Save Richmond Beach on Dispositive Motion
31 Regarding Lack of Public Notice (Jan. 10, 2011) at 7.

32 ⁶⁰ Snohomish County Motion to Strike Declaration of Zachary Hiatt, All Exhibits Thereto, and Portions of the Reply of Save
Richmond Beach (Jan. 11, 2011).

⁶¹ Petitioner Save Richmond Beach (Limited) Response to Snohomish County Motion to Strike Declaration of Zachary Hiatt
(Jan. 12, 2011).

ORDER ON DISPOSITIVE MOTIONS *Shoreline III* and *Shoreline IV*

Coordinated Case Nos. 09-3-0013c and 10-3-0011c

January 18, 2010

Page 15 of 28

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1 ordinances challenged in *Shoreline III*.⁶² SRB's objection under Legal Issue 7 is limited to a
2 last-minute amendment to Ordinance No. 09-051.⁶³

3
4 Save Richmond Beach contends that the County provided notice of Amendment 2 prior to a
5 continued hearing on Ordinance 09-051. However, at the outset of the continued hearing,
6 Amendment 2A was introduced. Persons attending the hearing had only one hour to
7 consider and comment on Amendment 2A before the hearing was closed and the County
8 Council took action, adopting Amendment 2A.

9
10 The Board reviews Amendment 2 and Amendment 2A in light of SRB's assertion that 2A
11 was a substantive amendment requiring re-notice and opportunity for additional public
12 comment. Amendment 2, set forth in full in the County's Notice of Continuance of Public
13 Hearing, Index # 217, adds two new policies to Comprehensive Plan Land Use Objective
14 4.B concerning design guidelines for Urban Centers:

15
16 4.B.3 Consistent with Objective LU 4.B.2, the county encourages cities to
17 prepare design guidelines to provide guidance to property owners, surrounding
18 neighborhoods and development interests for those urban centers situated within
19 the respective city MUGAs. Enactment and implementation of such design
20 guidelines, governance and service issues shall occur through interlocal
21 agreements between the city affiliated with the unincorporated urban center and
the county.

22 4.B.4. Implementation of the Point Wells Urban Center shall occur through the
23 application of the Urban Center Zone. In addition to the defined use and bulk
24 requirements, the zone text shall also include the following provisions:

25 (a) Specific design standards based on the design guidelines implemented
pursuant to LU Policy 4.B.3.

26 (b) A requirement in the development agreement that binds the parties to the
27 approved conditions of a development master plan.

28 (c) A requirement that an administrative design review panel composed of
29 qualified design professionals be created to recommend design-related elements
30 to the approving authority.

31
32

⁶² County Dispositive Motion, at 26-32.

⁶³ SRB Response to County's Dispositive Motion, at 6-12.

ORDER ON DISPOSITIVE MOTIONS *Shoreline III* and *Shoreline IV*

Coordinated Case Nos. 09-3-0013c and 10-3-0011c

January 18, 2010

Page 16 of 28

1 Amendment 2A, Index #230, folds the design review panel recommendations into existing
2 Policy 4.B.1 and rewords the implementation of city design criteria in a new Policy 4.B.3:

3 4.B.1 adds : Where appropriate, the design review process may include an
4 administrative design review panel composed of qualified design review
5 professionals to review and make recommendations on design guidelines,
6 development regulations and incentives.

7 New 4.B.3 reads: The county recognizes the importance of implementation of
8 specific design guidelines for mixed use areas in urban centers and urban villages
9 to the cities in whose MUGA they are constructed. The development regulations
10 which implement the urban centers and urban village mixed use areas shall
11 include mechanisms for city participation in the review of urban center
12 development permit applications.

13 If cities with urban centers situated within their respective MUGAs develop
14 recommendations to provide design guidance to property owners, surrounding
15 neighborhoods and development interests for those urban centers situated within
16 their MUGAs, the county may consider and incorporate some or all of the cities'
17 recommendations in the county's development regulations for Urban Centers and
18 Urban Villages.

19 The Board finds that the notice for the continued hearing, with Amendment 2, effectively
20 alerted the public that the question before the Council was how design guidelines for the
21 Point Wells Urban Center would be developed and implemented. The Amendment 2 text
22 alerted the public to the possible role of adjacent cities, the mechanism of interlocal
23 agreements, and the involvement of a design review panel. The notice specifies that the
24 County Council, at its continued hearing, may adopt or reject this amendment or "adopt an
25 amended version" of the recommendations.⁶⁴

26 The memo accompanying Amendment 2A, as proposed at the outset of the continued
27 hearing, explains that the revised text requires the County to work with neighboring cities to
28 develop design guidelines for Urban Centers, allows use of an administrative design review
29 panel, includes mechanisms for the County to involve cities in development application
30
31
32

⁶⁴ Index #217, at 6.
ORDER ON DISPOSITIVE MOTIONS *Shoreline III and Shoreline IV*
Coordinated Case Nos. 09-3-0013c and 10-3-0011c
January 18, 2010
Page 17 of 28

1 review, and allows the County to incorporate city design recommendations in its
2 development regulations for Urban Centers.⁶⁵

3
4 The Board recognizes that the policy adopted under Amendment 2A is not *identical* to the
5 Amendment 2 proposal. Amendment 2A allows, but does not *require*, the County to
6 implement design criteria developed by neighboring cities. Save Richmond Beach asserts
7 that the differences are significant and require re-noticing and/or extension of time for public
8 comment. The Board is not persuaded.

9
10 The GMA requires cities and counties to provide reasonable notice of proposed
11 amendments to comprehensive plans and development regulations.⁶⁶ This is part and
12 parcel of the obligation to provide for “early and continuous” public participation.⁶⁷ The
13 Board’s decisions recognize that a proposal may be modified during the course of public
14 debate without necessarily requiring publication of a new notice.⁶⁸

15
16
17 If a change to a comprehensive plan amendment is proposed *after* the public comment
18 period is closed, the city or county must re-notice the matter and allow public review unless
19 one or more statutory exceptions apply. Even for changes *after* public comment is closed,
20 the GMA provides an exception to re-noticing if “the proposed change is within the scope of
21 the alternatives available for public comment.”⁶⁹

22
23 In the present case, the language of Amendment 2A was introduced at the outset of the
24 County Council’s final public hearing, and the public had an hour to comment. Both the
25 Town of Woodway and SRB provided public testimony.⁷⁰ Further, the County Council
26 already had the input of participants, including SRB, on previously-proposed Amendment 2,
27

28
29 ⁶⁵ Index #230, at 1.

30 ⁶⁶ RCW 36.70A.035(1)

31 ⁶⁷ RCW 36.70A.140

32 ⁶⁸ *Halmo v. Pierce County*, CPSGMHB Case No. 07-3-0004c, Final Decision and Order (Sep. 28, 2007), at 14-15;
Cave/Cowan v. City of Renton, CPSGMHB Case No. 07-3-0012, Final Decision and Order (July 30, 2007), at 12-13; *NENA*
v. City of Everett, CPSGMHB Case No. 08-3-0005, Final Decision and Order (Apr. 28, 2009), at 16-17.

⁶⁹ RCW 36.70A.035(2)(b)(ii).

⁷⁰ Index #254, see County Reply on Dispositive Motions, at 38.

ORDER ON DISPOSITIVE MOTIONS *Shoreline III and Shoreline IV*

Coordinated Case Nos. 09-3-0013c and 10-3-0011c

January 18, 2010

Page 18 of 28

1 and so the Council was well-informed of public concerns about implementation of Urban
2 Center design guidelines and the role of adjacent cities in this process.

3
4 The Board finds the text of Amendment 2A was provided to the public and the County
5 received public comment prior to the close of its public hearings. The Board concludes that
6 Petitioners have not demonstrated Snohomish County's adoption of Amendment 2A
7 (Design Guidelines) failed to comply with GMA notice and public participation requirements.
8 Therefore the County's motion to dismiss Legal Issue 7 as to the *Shoreline III* cases is
9 **granted.**
10

11 3. *Save Richmond Beach Dispositive Motion Regarding Notice in Shoreline IV*
12 Save Richmond Beach's challenge to notice and public participation in the *Shoreline IV*
13 case concerns two late amendments to Ordinance 09-079.⁷¹ The first was a change to SCC
14 30.34A.085 that extended the maximum distance between Urban Center development and
15 transit stops from a proposed one-quarter mile to one-half mile and added a provision
16 allowing vanpools to transport people to transit stops at greater distance. The second, as
17 described by SRB, was a change to the review process that allowed development
18 agreements to replace the County's Type 1 or Type 2 permit process. These changes were
19 adopted on May 12, 2009, almost three weeks after the close of the public comment period
20 on April 21.⁷²
21

22
23
24 The County and Intervenor BSRE respond that the amendments were well within the scope
25 of the prior public discussion.⁷³
26

27 RCW 36.70A.035 subsection (1) calls for effective notice of comprehensive plan actions.
28 Subsection (2) requires additional analysis and opportunity for public participation if,
29 subsequent to public hearing, a change to a comprehensive plan is proposed which is
30

31
32 ⁷¹ Petitioner SRB's Dispositive Motion re: Public Notice (*Shoreline IV*)

⁷² *Id.* at 5.

⁷³ County Response to SRB Dispositive Motion, at 12-21; Intervenor's Response to Motions, at 6-9.

ORDER ON DISPOSITIVE MOTIONS *Shoreline III and Shoreline IV*

Coordinated Case Nos. 09-3-0013c and 10-3-0011c

January 18, 2010

Page 19 of 28

1 outside the scope of what has thus far been publicly noticed and analyzed. In the Board's
2 view:⁷⁴

3 With these provisions, the statute tries to find a thoughtful balance between the
4 need for transparency and public input in legislative action and the need for
5 flexibility and finality. The public is entitled to know and comment on the City
6 Council's proposed comprehensive plan or regulatory amendment, but at some
7 point the elected officials must be able to incorporate public comments in their
8 consideration and take a final vote.

9 In reviewing the amendments challenged here, the Board is mindful of its holding in *Burrows*
10 *v. Kitsap County*.⁷⁵

11 There is no GMA requirement that the County must have prepared a document
12 for public inspection specifically proposing all elements of the amendments
13 ultimately adopted by the County; it is enough that the changes to the County-
14 proposed amendments were within the scope of alternatives available for public
15 comment.

16 *Burrows* and other Board decisions establish that requirements for effective notice and fair
17 public process do not mandate that the final language of the ordinance be available for
18 public comment before it can be adopted.⁷⁶ Rather, when a proposal is amended *after* the
19 public process is closed, the Board must determine whether it was "within the scope of
20 alternatives available for public comment," as set forth in RCW 36.70A.035(2), or whether a
21 new notice and opportunity for comment is required. The Board reviews the two changes
22 noted by Save Richmond Beach in light of that standard.

23
24 *Transportation Access Amendment*. Amendment 10A as noticed for the County Council's
25 public process⁷⁷ provided:
26
27

28 ⁷⁴ *Pilchuck Audubon Society v. City of Mukilteo*, CPSGMHB Case No. 05-3-0029, Final Decision and Order (Oct. 10,
29 2005), at 17-18.

30 ⁷⁵ CPSGMHB Case No. 99-3-0018, Final Decision and Order (Mar. 29, 2000), at 10.

31 ⁷⁶ *McVittie VI v Snohomish County*, CPSGMHB Case No. 01-3-0002, Order on Motions (Oct. 11, 2001), at 4 ("To clarify,
32 the Board did not intend that the degree of detail of the notice mimic the actual ordinance"); *Pirie v. City of Lynnwood*,
CPSGMHB Case No. 06-3-0029, Final Decision and Order (Apr. 9, 2007), at 16 (Petitioner's allegations that notices are
deficient "because the notices fail to set forth the full text of any proposed action" are unfounded); *Halmø, supra*, at 14-15
(GMA notice and public participation provisions do not require County Council to provide reasoned explanation of revisions
and modifications to amendments.)

⁷⁷ Index #270

1 Business or residential buildings within an urban center either (1) must be
2 constructed within one-quarter mile of existing or planned stops or stations for
3 high capacity transit routes or (2) must provide new stops or stations within one-
4 quarter mile of any business or residence and work with transit providers to
5 assure use of the new stops or stations.

6 The amendment actually adopted by the County Council provided:

7 Business or residential buildings within an urban center either:

- 8 (1) Shall be constructed within one-half mile of existing or planned stops or stations
9 for high capacity transit routes such as light rail or commuter lines or regional
10 express bus routes or transit corridors that contain multiple bus routes:
11 (2) Shall provide for new stops or stations for such high capacity transit routes or
12 transit corridors within one-half mile of any business or residence and coordinate
13 with transit providers to assure use of the new stops or stations; or
14 (3) Shall provide a mechanism such as van pools or other similar means of
transporting people on a regular schedule in high occupancy vehicles to
operational stops or stations for high occupancy transit.

15 The Board finds ample evidence in the County's record that the one-half mile distance was
16 discussed, along with the quarter-mile distance, during the Council's public process.⁷⁸ In
17 fact, SRB submitted a comment opposing "the ½ mile that was proposed in a previous
18 round of amendments."⁷⁹

19
20
21 As for the "van pool" amendment, Intervenor BSRE explains that the County and developers
22 understood that new stations for high-capacity transit might not be constructed at the same
23 time as Urban Center development; thus the regulations refer to "existing *or planned* stops
24 or stations." As an interim measure, they state, van pools or other regularly-scheduled high
25 occupancy vehicles should be provided to shuttle people to transit stops. BSRE points to
26 the minutes of the Council's May 5 General Legislative Session where Councilmember
27 Somers "stated that this amendment would require an urban center to provide van pool or
28 other access to transit until transit service is established by a transit agency."⁸⁰

30
31
32 ⁷⁸ Index #324, Public Hearing Sept. 30, 2009; Index # 111, Planning and Community Development Committee Public
Meeting, Jan. 12, 2010; Index #114 and 332, Administrative Committee Public Meeting, Apr. 5, 2010.

⁷⁹ Index #254, Letter from Caycee Holt, SRB, to Council Member Dave Gossett, Apr. 21, 2010.

⁸⁰ Index #327, at 5.

1 The Board agrees the County could have inserted the word "interim" in its regulations to
2 clarify its intent. The language of Amendment 10A, Subpart (3) could have read: "(3) Shall
3 provide an interim mechanism such as van pools..." (new language underlined). However,
4 failure to do so doesn't raise the error to the level requiring new notice and public process.
5 The Board is not persuaded that the transportation access amendments are beyond the
6 scope of the alternatives which the public had the opportunity to review.
7
8

9 *Project Review Process Amendment.* The County's Notice of Continuation of Public
10 Hearing for the April 21, 2010 hearing⁸¹ listed numerous amendments for possible
11 consideration which addressed the review process for Urban Center applications. Proposed
12 Amendments 7, 7A and 7B each addressed the negotiation of *interlocal agreements* with
13 neighboring jurisdictions. Proposed Amendments 9, 9A, and 9B each would make the
14 review of Urban Center applications a *Type 2 review* whereby the permit decision would be
15 made by the Hearing Examiner. Proposed Amendment 9C created a "hybrid project review
16 process" in which a *design review board* would make recommendations to the Hearing
17 Examiner. Proposed Amendment 12A required a *development agreement* between the
18 applicant and neighboring jurisdictions, as well as design review committee
19 recommendations.
20
21

22 The record indicates that Save Richmond Beach was a co-sponsor of Amendment 12A and
23 made formal comment in support of the development agreement proposal.⁸²
24

25 The Board reads the new process adopted by Ordinance 09-079⁸³ as combining long-
26 discussed review procedures, as to which there had been ample testimony, into a two-step
27 process. First, the applicant is required to seek to negotiate an agreement with neighboring
28 jurisdictions. That agreement forms the basis of a development agreement with the County,
29 to be reviewed through the County's existing regulations for such agreements. If
30
31

32 ⁸¹ Index #152.

⁸² Index #235.

⁸³ See full text in SRB's Dispositive Motion, at 9-10.

ORDER ON DISPOSITIVE MOTIONS *Shoreline III and Shoreline IV*

Coordinated Case Nos. 09-3-0013c and 10-3-0011c

January 18, 2010

Page 22 of 28

1 negotiations with neighboring jurisdictions fail, the application can instead be made directly
2 to the County, subject to review by the design review board and Hearing Examiner as a
3 Type 2 procedure. So interlocal agreements, development agreements, design review
4 board, and Type 2 Hearing Examiner proceedings – all the process options that were
5 discussed in the County’s public process – were coordinated in the process adopted by
6 Ordinance 09-079.
7

8 Save Richmond Beach objects because it contends the hybrid process, as enacted,
9 contains a possible loop-hole; an applicant could avoid Type 1 or Type 2 review (with their
10 requirements for public input) by negotiating an effective agreement with the neighboring
11 jurisdictions.⁸⁴ But the question before the Board is not whether Ordinance 09-079 adopts
12 the optimal application process but only whether the notice of potential amendments was
13 sufficient under the GMA. The Board recognizes that a hybrid process will operate
14 somewhat differently than any of the stand-alone options, but the Board is not persuaded
15 that the project review process amendments are beyond the scope of the alternatives which
16 the public had the opportunity to review.
17
18

19 In sum, the Board finds that the challenged amendments to Ordinance 09-079, which were
20 adopted after the close of public hearings, were within the scope of the alternatives
21 available for public comment. The Board concludes that Petitioners have not demonstrated
22 Snohomish County’s adoption of the amendments violated GMA notice and public
23 participation requirements.
24
25

26 **Conclusion.** For the foregoing reasons the Board **denies** Save Richmond Beach’s
27 dispositive motion regarding lack of public notice (*Shoreline IV*) and **grants** Snohomish
28 County’s dispositive motion concerning notice and public participation (*Shoreline III* and
29 *Shoreline IV*). Save Richmond Beach has not carried its burden of demonstrating that the
30
31
32

⁸⁴ The County asserts that the “right to review a development agreement and the process of that review is identical to the County appeal process for Type 2 decisions.” County Response to SRB Dispositive Motion, at 27, fn. 47.

1 County failed to comply with RCW 36.70A.035 and .140 or to be guided by RCW
2 36.70A.020(11). Legal Issue 7 is **dismissed**.

3 4 ORDER

5 Based on review of the motions of the parties, the GMA, the Board's rules of practice and
6 procedure and prior case law, the briefs and arguments submitted, and having deliberated
7 on the matter, the Board ORDERS:

- 8
9
10 1. The motion of Richmond Beach Preservation Association and 23 named individuals
11 for voluntary dismissal is **granted**. The Richmond Beach Preservation Association
12 and named individuals are **dismissed** from the *Shoreline III* proceeding. This
13 dismissal renders the County's motion regarding these parties moot.
- 14 2. Save Richmond Beach lacks standing to pursue SEPA claims in these proceedings.
15 The City of Shoreline has standing to pursue SEPA claims in both *Shoreline III* and
16 *Shoreline IV*. Snohomish County's motion to dismiss Save Richmond Beach SEPA
17 challenges in *Shoreline III* and *IV* is **granted**. Snohomish County's motion to dismiss
18 City of Shoreline SEPA claims in *Shoreline III and IV* is **denied**.
- 19 3. The Board **denies** Save Richmond Beach's dispositive motion regarding lack of
20 public notice (*Shoreline IV*) and **grants** Snohomish County's dispositive motion
21 concerning notice and public participation (*Shoreline III and Shoreline IV*). Legal
22 Issue 7 is **dismissed**.
23

24
25 Further ORDERED:

- 26 4. The Board establishes a page limitation for briefing on the merits. Petitioners are
27 limited to one 15-page consolidated statement of facts and prehearing briefs of 25
28 pages each. Response briefs of the County and Intervenor are limited to 30 pages
29 each. Reply briefs, if any, are limited to 15 pages.
30

31 NOTE: This Order on Motions is not a final order in these proceedings and is not subject to
32 motions for reconsideration. WAC 242-02-832(1).

1 DATED this 18th day of January, 2011.

2
3 _____
4 Margaret A. Pageler, Board Member

5
6 _____
7 David O. Earling, Board Member

8
9 _____
10 William P. Roehl, Board Member
11 (Concurring in result only as to SEPA Standing)

12
13 **Concurring Opinion of Board Member William Roehl**

14 I concur in the outcome of this order but would apply a different analysis concerning
15 Petitioners' standing to pursue SEPA claims. RCW 36.70A.280 provides in relevant part as
16 follows:

17 (1) The growth management hearings board shall hear and determine only those
18 petitions alleging either:

19 (a) That . . . a . . . county . . . planning under this chapter is not in compliance
20 with the requirements of . . . chapter 43.21C RCW as it relates to plans,
21 development regulations, or amendments, adopted under RCW 36.70A.040 . . .

22 (2) A petition may be filed only by: (a) The state, or a county or city that plans
23 under this chapter; (b) a person who has participated orally or in writing before
24 the county or city regarding the matter on which a review is being requested; (c)
25 a person who is certified by the governor within sixty days of filing the request
26 with the board; or (d) a person qualified pursuant to RCW 34.05.530.

27 In this instance, Shoreline and Save Richmond Beach seek to pursue SEPA claims. That is,
28 they allege Snohomish County, a county planning under chapter 36.70A, did not comply
29 with chapter 43.21C, the State Environmental Policy Act, when enacting the ordinances at
30 issue in these cases. Under RCW 36.70A.280, petitions raising such an allegation may be
31 filed by a city that plans under this chapter (Shoreline is such a city); a person who
32

1 participated orally or in writing before the county regarding the matter on which review is
2 requested (whether or not Shoreline or SRB participated is a factual question)⁸⁵ or, by a
3 person qualified pursuant to RCW 34.05.530⁸⁶ (that is, do Shoreline or SRB have standing
4 under the Administrative Procedure Act to raise a SEPA challenge).⁸⁷

5
6 It is only when a petitioner relies on APA standing that the Board would appropriately apply
7 the requirements of RCW 34.05.530, statutory conditions originating in federal case law
8 incorporating the "zone of interest" and "injury-in-fact" requirements.⁸⁸

9
10 In all instances where a party seeks to challenge a jurisdiction's SEPA determination it is
11 imperative that they previously provided relevant, timely comment to the jurisdiction. The
12 SEPA rules at WAC 197-11-545 set forth the ramifications of a failure to provide such
13 comment:
14

15 (1) Consulted agencies. If a consulted agency does not respond with written
16 comments within the time periods for commenting on environmental documents,
17 the lead agency may assume that the consulted agency has no information
18 relating to the potential impact of the proposal as it relates to the consulted
19 agency's jurisdiction or special expertise. Any consulted agency that fails to
20 submit substantive information to the lead agency in response to a draft EIS is
21 thereafter barred from alleging any defects in the lead agency's compliance with
22 Part Four of these rules.

23 (2) Other agencies and the public. Lack of comment by other agencies or
24 members of the public on environmental documents, within the time periods
25 specified by these rules, shall be construed as lack of objection to the
26 environmental analysis, if the requirements of WAC 197-11-510 are met.

27 ⁸⁵ *Wells v. Western Washington Growth Management Hearings Board*, 100 Wn. App.657, 999 P.2d 405 (2000), clarified
28 that to establish participation standing under the GMA a person must show that his or her participation before the
29 jurisdiction was reasonably related to the issue the petitioner presents to the Board.

30 ⁸⁶ RCW 34.05.530: A person has standing to obtain judicial review of agency action if that person is aggrieved or adversely
31 affected by the agency action. A person is aggrieved or adversely affected within the meaning of this section only when all
32 three of the following conditions are present:

(1) The agency action has prejudiced or is likely to prejudice that person;

(2) That person's asserted interests are among those that the agency was required to consider when it engaged in the
agency action challenged; and

(3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or
likely to be caused by the agency action.

⁸⁷ A fourth method for achieving standing under RCW 36.70A.280(2) is by governor certification.

⁸⁸ *St. Joseph Hosp. & Health Care Ctr. v. Department of Health*, 125 Wn.2d 733, 739

ORDER ON DISPOSITIVE MOTIONS *Shoreline III and Shoreline IV*

Coordinated Case Nos. 09-3-0013c and 10-3-0011c

January 18, 2010

Page 26 of 28

1 The County sets forth its understanding of the Central Board's current SEPA standing
2 requirements.⁸⁹

3
4 The Board's SEPA standing test is comprised of multiple components, all of
5 which must be met in order for a person to have SEPA standing. First, the person
6 must have provided pertinent, specific comments to the SEPA lead agency
7 during the applicable SEPA comment period. Next, the person must allege SEPA
8 standing in his or her petition. Finally, the person must satisfy both the "zone of
interest" and "injury in fact" requirements of the APA standing test.

9 I generally concur with the application of those requirements if, and only if, the petitioner is
10 relying solely on APA standing to support a SEPA challenge, that is under RCW 36.70A.280
11 (2)(d). However, as previously referenced there are other routes to establish standing,
12 those authorized by RCW 36.70A.280(2)(a) and (b). The standing test under those
13 subsections should only include the requirements to have provided pertinent, specific
14 comment to the SEPA lead agency and the inclusion of a sufficient assertion of standing in
15 the challenger's PFR.
16

17
18 Applying the articulated two-part test for standing under RCW 36.70A.280(2)(a) and (b), I
19 conclude Shoreline has standing to challenge the County's SEPA process under both RCW
20 36.70A.280(2)(a) and (b):

- 21 1. RCW 36.70A.280(2)(a): It is a city planning under chapter 36.70A. RCW; it
22 provided relevant, timely comment and included a sufficient allegation of standing
23 in its Petition for Review;
24 2. RCW 36.70A.280(2)(b): It is a "person"; and, again, it provided relevant, timely
25 comment and included a sufficient allegation of standing in its Petition for
26 Review.

27 Finally, I concur with the majority that Shoreline has satisfied the standing requirements
28 applicable to RCW 36.70A.280(2)(d); that is, the APA test for standing.

29
30 As to SRB, there does not appear in the record any evidence of it having participated in the
31 SEPA review process by providing comment. Nor does it allege it so participated. SRB's
32

⁸⁹ Snohomish County's Reply at 10
ORDER ON DISPOSITIVE MOTIONS *Shoreline III and Shoreline IV*
Coordinated Case Nos. 09-3-0013c and 10-3-0011c
January 18, 2010
Page 27 of 28

1 lack of comment must be construed as lack of objection to the environmental analysis in
2 accordance with WAC 197-11-545(2).

3
4 The underlying basis of my disagreement with the majority is its requirement that SEPA
5 challengers must, in all instances, meet the APA standing test. The GMA establishes four
6 separate methods for achieving standing. Of those, only RCW 36.70A.280(2)(d)
7 incorporates RCW 34.05.530. Consequently, the APA standing requirements should only be
8 found to apply to those seeking standing under that subsection.
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William Roehl, Board Member
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